plaintiff's right to compensation because the federal government had clearly established that the property would have been injurious to the public health and safety:

> The government's argument would enable Congress to pass laws which eliminate property rights retroactively as if those rights never existed in the first place. Where there is a confiscatory regulation, the *Lucas* Court declared: "Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." The government must show a limit on plaintiff's property rights which inhered in the title when it was purchased by its owner. . . . . Congress or regulators cannot simply bypass the Fifth Amendment's just compensation provision by declaring long-settled property rights illegal or not permitted. Nor can the artful recitation of a harm-preventing or benefit-conferring justification transform compensable government action into that which is not compensable. *Florida Rock Indus., Inc. v. United States*, No. 266-82L, 1999 U.S. Claims LEXIS 215, at 23-4 (Fed. Cl. Aug. 31, 1999)(internal citations omitted).

Because certain proposals in the NPRM would attempt to trump well-established state and local property rights in the name of an overriding federal objective, they would fall under exactly the same scrutiny applied to the "wetlands" regulations at issue in *Florida Rock*. Just as Chief Judge Smith referred back to Supreme Court precedent to explain that it is the state law understanding of nuisance limitations on property rights that governs whether or not the wetlands rules effected a taking, so too would a court look to a landlord's underlying contractual and property rights in determining whether or not it had already ceded the right to occupy its facilities to any and all telecommunications carriers in determining whether the NPRM's nondiscriminatory access rules constitute a taking. As explained in our prior submission, in most instances, this inquiry will show that the forced access rules proposed in the NPRM will in fact run afoul of the Takings Clause.

B. The Eleventh Circuit Has Recently Reinforced The Holding In *Loretto* By Deciding That A Nondiscriminatory Forced Access Rule Constitutes A Taking Under The Fifth Amendment

The most aggressive proponents of the view that *Loretto* is a narrow holding and that "the right to assert a *per se* taking is easily lost"[85] could not have wished for better facts to champion their cause than those presented in *Gulf Power Co. v. United States,* No. 98-2403, 1999 U.S. App. LEXIS 21574 (11th Cir. Sept. 9, 1999). This case presented the fault line between the decision in *Loretto*, which protects against all uninvited permanent physical occupations of property, and the decision in *Florida Power*, which is cited by many who seek to avoid the obvious reach and import of *Loretto*. Indeed, as both the District Court and the Court of Appeals that decided *Gulf Power* recognized, the controversy before them presented the "future case" anticipated by the Supreme Court in *Florida Power*: *i.e.*, "what the application of [*Loretto*] would be if the FCC in a future case required utilities, over objection to enter into . . . pole attachment agreements." 1999 U.S. App. LEXIS 21574, at *8; *Gulf Power Co. v. United States*, 998 F. Supp. 1386, 1392 (N.D. Fla. 1998) (internal citations omitted). Unfortunately for those who wish to scale back the clear meaning of *Loretto*, in an opinion issued September 9, 1999, the Eleventh Circuit agreed with the lower court before it that this "future case" required no more than a straightforward application of *Loretto*'s *per se* protection against government authorized, permanent physical occupations.

Specifically, the facts in *Gulf Power* involved a requirement that utilities allow cable companies access to their poles on a nondiscriminatory basis. Both of the courts that considered this case found it easy to apply *Loretto* and not *Florida Power* as the governing precedent. [86]In

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[85] *See* Teligent Comments at 54.

[86] *See Gulf Power Co. v. United States,* No. 98-2403, 1999 U.S. App. LEXIS 21574 (11th Cir. Sept. 9, 1999), *aff'g Gulf Power Co. v. United States*, 998 F. Supp. 1386 (N.D. Fla. 1998).

affirming the district court, the Eleventh Circuit considered, and rejected, a number of arguments. First, it held that the fact that the utility initially obtained its property through eminent domain did not mean that it did not hold the right to exclude permanent occupations authorized for a public purpose.[87] Similarly, the court held that the special "quasi public" status of the utility did not weaken the Constitutional protection of its property rights, and that the assertion of the procompetitive policies behind the authorized occupation could not cure it of the takings infirmity.[88] Finally, the Court rejected the argument that a permanent occupation authorized through a nondiscriminatory rule was somehow not a taking because the utilities could avoid it by refraining from making their facilities available for any carrier.[89]

Of all of these arguments, only the final two could be applied to a case where building owners complained as to occupations authorized by forced access rules promulgated by the Commission. The Eleventh Circuit gave short shrift to the procompetitive argument, which was based on the Telecommunications Act of 1996 and the supposed "monopoly control" exercised by utilities, characterizing it as "meritless." Likewise, the Court viewed the nondiscrimination argument as "foreclosed by *Loretto*."[90] As discussed above, a mandatory access rule is no less a taking because it can be avoided by not providing limited access to others or by not engaging in limited "use" activity oneself. As directly addressed by the Supreme Court in *Loretto*, the landlord's ability to rent, and hence also the landlord's ability to offer limited access to certain carriers, "may not be conditioned on his forfeiting the right to compensation for a physical occupation. [This] broad use-dependency argument proves too much. . . . The right of a

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[87] *Id.* at 15.

[88] *Id.* at 18-19.

[89] *Id.* at 19-20.

[90] *Id.*

property owner to exclude a stranger's physical occupation of his land cannot be so easily manipulated." *Loretto*, 458 U.S. at 439, n. 17 (internal citations omitted).

Thus, contrary to the insistent repetition of the CLEC commenters, there is no exception to the holding of *Loretto* for nondiscriminatory access rules. The Commission would have no legal basis for following the advice of these commenters in believing that it could enact such nondiscriminatory rules without implicating the just compensation requirement of the Takings Clause. The lengthy discussion given by some of these commenters to the Supreme Court's 1964 decision in the famous civil rights case of *Heart of Atlanta Motel, Inc., v. United States*, 379 U.S. 241 (1964) is misleading and patently inapposite. This case involved an analysis of the public accommodations provision of the 1964 Civil Rights Act in light of the Court's Reconstruction era *Civil Rights Cases*, 109 U.S. 3 (1883), which had ruled analogous provisions of earlier legislation unconstitutional. The decision gave no more than two conclusory sentences' worth of consideration to the defendant's takings claims, and is easily distinguished from the wealth of more recent Supreme Court precedent that has articulated the current scope of the Takings Clause. Indeed, at its most basic level, the *Heart of Atlanta* decision is fundamentally different from the Takings Clause issues on which the Commission requested comment since it involved the consideration of specially protected constitutional interests that arise from immutable human characteristics, rather than a consideration of the protection of private property against a permanent occupation by a party with purely commercial interests. It therefore is implausible that this very different decision somehow changes the analysis of the Takings Clause today, and it is no surprise that the precedent was not raised or discussed in the *Gulf Power* decisions.

In sum, the CLEC commenters have not submitted any arguments that can prevent the Commission from reaching the straightforward conclusion that the forced access rules proposed in the NPRM would constitute *per se* takings. No such arguments were submitted because none exist—the state of the law is such that the Supreme Court's decision in *Loretto*, as exemplified in the Eleventh Circuit's recent opinion in *Gulf Power*, leaves no room for anything but the unambiguous conclusion that a building owner has a constitutional right to exclude a telecommunications carrier from the premises unless it is clear under local law that it has ceded that right to that carrier.

C. The CLEC Commenters Also Ignore The Fact That The Property Rights Of MTE Building Owners Are Also Protected By The Regulatory Takings Doctrine

After glossing over or ignoring the NPRM's clear implication of the *per se* takings doctrine, the CLEC commenters dismissively conclude that the Commission's proposals in the NPRM would also fail to cause a taking under the balancing test set forth in the regulatory takings doctrine. Given the complicated judicial balancing test involved, it is extremely misleading to inform the Commission that it need not concern itself with whether or not the NPRM may cause a regulatory taking.

Indeed, the CLEC commenters do not address the critical facts that a court will consider in determining whether or not the Commission has promulgated a rule that constitutes a regulatory taking. Most importantly, these commenters ignore the fact that the "economic impact" on building owners may in many instances be very significant, and that many building owners will have "investment backed expectations" as to their ability to earn revenues related to the provision of telecommunications services. Instead, the commenters try to argue that the economic impact is minimal based on a series of irrelevant facts—that building owners will be

compensated for any damage to their property,[91] that competitive carriers are currently providing compensation to building owners,[92] and that "in most cases" the ILECs have access for free.[93] These assertions are both highly disputable as a matter of actual fact, and also completely irrelevant to whether the NPRM's forced access rules would cause a significant economic impact on building owners and interfere with their investment backed expectations.

In reality, building owners do in fact have a right to participate in managing and administering the delivery of the best possible telecommunications services to their tenants, and a strong economic interest in doing so. A court that is trying to assess the economic impact of one of the proposed rules in the NPRM on a building owner, and its interference with the owner's investment backed expectations, will have no reason or legal basis for blinding itself from the effects of the deregulation of the telecommunications industry. This deregulation is a part of the world building owners live in and invest in, and absolutely must be of central relevance to any regulatory takings analysis applied to the NPRM.

Thus, the statement that building owners cannot have an investment backed expectation because "most buildings were built before the advent of telecommunications competition" essentially concedes that the NPRM will effect a regulatory taking.[94] Because this argument leaves untouched the billions of dollars in real estate transactions that have occurred since "the

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[91] Teligent Comments at 59.

[92] Winstar Comments at 42.

[93] Winstar Comments at 42; Teligent Comments at 60.

[94] *See* Winstar Comments at 42.

advent of telecommunications competition,"[95] the CLEC commenters essentially admit that investors in real estate since the advent of competition may indeed have very viable regulatory takings claims, an admission with which the Real Access Alliance agrees. The large amounts of investment capital that have been attracted to large scale real estate investments over the past several years has undoubtedly relied in part on the uniquely important role MTE building owners play in the world of deregulated telecommunications.

The CLEC commenters, while forwarding several insubstantial and irrelevant reasons why the NPRM should not cause a regulatory taking in some cases, are in fact in implicit agreement with the Alliance that the forced access rules contemplated by the Commission would in many instances constitute a regulatory taking requiring payment of just compensation.

D. The CLEC Commenters Recommend That The Commission Ignore The D.C. Circuit's Decision in *Bell Atlantic Telephone Companies v. FCC*, Asserting Without Grounds That It Is Either "Erroneous" Or "Distinguishable"

Because it is not possible to refute that the NPRM would take the property of MTE building owners without payment of just compensation, the commenters expend much of their effort in attempting to convince the Commission that it has the statutory authority to effect such a taking. This is clearly not the case, and the CLEC commenters' arguments run headlong into clear judicial precedent to that effect, in the form of *Bell Atlantic v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994).

To begin with, the commenters seek to limit *Bell Atlantic* by torturing its analysis. The

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[95] The commenters conveniently fail to provide a date for this event, but even assuming "competition" began only with the passage of the Telecommunications Act of 1996, it is safe to assume that at least a billion dollars have changed hands in real estate transactions involving MTE building owners over the past three years.

D.C. Circuit held that the Commission locked authority to order physical collocation between competitive access providers ("CAPs") and ILECs because this form of collocation "would seem necessarily to 'take' property regardless of the public interests served in a particular case." *Bell Atlantic* at 445 (internal citations omitted). The CLEC commenters try to distinguish this ruling—which is directly on point to the question of whether or not the Commission has authority to take the property of building owners—by arguing that the ILECs in *Bell Atlantic* had practically no choice but to allow the physical collocation (there were two exceptions to the requirement), whereas building owners could easily avoid the NPRM simply by not having any telecommunications carriers present on their property.[96] This argument, which the Supreme Court rejected when it was used to try to defeat a takings claim, *see Loretto*, at 439, n. 17, fares no better when dressed up as a way to discover the Commission's statutory authority to exercise the power of eminent domain. It is simply ludicrous to state that building owners are not subject to a forced access rule because they could "choose" not to allow any carriers onto their premises, and the absurdity is compounded by asserting that this choice somehow gives the Commission the authority to effect a taking.

The commenters then attack well established Supreme Court precedent that *Bell Atlantic* relied on in analyzing how to construe a statute in light of constitutional concerns and the assertion of eminent domain powers. By extracting the word "necessarily" from the *Bell Atlantic* decision, the commenters attempt to show that there must be some kind of absolutist showing of takings liability in order to convince a court to follow the Supreme Court decisions in *Rust v. Sullivan*, 500 U.S. 173 (1991), which requires a narrow construction of authority whenever administrative orders raise substantial constitutional questions, and *Youngstown Sheet & Tube*

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[96] Teligent Comments at 66.

Co. v. Sawyer, 343 U.S. 579, 631-32 (1952), requiring clear authority from Congress whenever an agency seeks to take private property.

The Commission should disregard this argument for two reasons. First, it is in fact the case, as the foregoing discussion reaffirms, that the NPRM would if promulgated effect a taking of the private property of building owners, and this fact is essentially indisputable based on the strength of the decisions of *Loretto* and *Gulf Power*. Moreover, to the extent any argument might conceivably exist as to the exact likelihood of whether the NPRM's promulgation would effect a taking, the proof of the existence of such a taking is by no means a prerequisite for a court to find that the Commission lacked the authority to promulgate the NPRM. In fact, the cases cited by the commenters themselves demonstrate that what is required is not unassailable proof of a taking, but simply something more than a "possibility" or a "specter." *Cf. United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 128 n. 5 (1985); *Nat'l Mining Association v. Babbitt*, 172 F.3d 906 (D.C. Cir. 1999). Thus, for a court to construe the Commission's statutory authority narrowly it is necessary only that the promulgated rules "seem" to effect a taking, at least in "an identifiable class of cases." *See Riverside*, 474 U.S. at 128 n. 5; *Bell Atlantic*, 24 F.3d at 1444.

In short, there is no basis for the Commission to disregard the D.C. Circuit's decision in *Bell Atlantic* as either "erroneous"[97]—a bold charge that is never explained—nor to view it as an "anomaly"[98] or as "inapplicable."[99] The Commission has absolutely no authority to disregard a clear holding by a U.S. Court of Appeals. The D.C. Circuit's opinion applied the well established avoidance canon to a statutory construction case that was, in fact, much stronger than

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[97] Teligent Comments at 74.

[98] Teligent Comments at 71.

would be the case for the Commission's authority to enact the forced access rules envisaged by the NPRM. The same court, or any other U.S. Court of Appeals, would reach exactly the same result in judging whether the Commission currently has statutory authority to take the property of building owners.

E. The CLEC Commenters Provide The Commission With A Totally Unrealistic Picture Of The Just Compensation Of The Property The NPRM Would Take

After misleading the Commission by arguing that the NPRM would be unlikely to effect a taking, the CLEC commenters add false assurances that "even if" a taking is found, it would not be problematic to create "a reasonable compensation requirement."[100] Blithely surmising that a $1 payment would be sufficient to provide constitutionally required just compensation to each and every MTE building owner in the country, these commenters fail to imagine the enormous reach of the rules suggested in the NPRM, and the substantial economic value that they shift from the real estate industry to the telecommunications industry.

Aside from vastly undervaluing the property the NPRM would take, this $1 suggestion states that a forced access rule "should be accompanied by a reasonable compensation requirement" without explaining how such a requirement is supposed to come into being. Congress certainly has not authorized the expenditure of funds in order to compensate MTE building owners for this taking (unsurprisingly, since Congress did not envisage or authorize the taking itself, *see* Section IV(D), above). Moreover, it cannot possibly be the case that the CLEC commenters expect the Court of Claims to limit its just compensation awards to $1. Thus, this suggestion appears to be simply a loose way of implying that, even under the assumption that the

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[99] Winstar Comments at 44.

[100] Teligent Comments at 68.

promulgation of the NPRM is a taking, the Commission need not worry about providing just compensation because the CLECs themselves do not think the property being appropriated for their use is worth very much.[101]

Unsurprisingly, the Real Access Alliance takes a very different view. The proposed rules in the NPRM, in addition to representing a direct infringement on a central constitutional right, clearly also hold tremendous economic significance for building owners. The property that would be appropriated, while relatively small in terms of physical space, is of potentially great value in terms of future revenues. No court could possibly accept that these property rights could be permanently transferred away from their owners without payment of any meaningful compensation.

Likewise, it is indeed hard to imagine that any court could agree that the Commission provided implicit compensation to building owners by forbearing from imposing regulations on them. The Commission has no authority to regulate building owners, and, in any event, there is no connection between the Commission's decision as to whether to undertake an extremely aggressive attempt to expand its jurisdictional reach to the real estate industry, and its separate decision to take the property of building owners without providing the just compensation required under the Fifth Amendment.

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[101] Of course, the fact the CLECs are now paying hundreds and even thousands of dollars a month for access to buildings belies this claim.

VI. EXTENDING THE OTARD RULES IN ANY WAY WOULD BE AN EXERCISE IN CONTINUED UNLAWFUL REGULATION.

There is really very little to say here. For obvious reasons, various types of wireless providers support the expansion of the current OTARD rules to (1) include common areas and restricted use areas; and (2) nonvideo services. Neither proposal is lawful.

In the misguided *OTARD Second Order*, the Commission recognized that it simply had no power to force property owners to allow the installation of antennas in common areas and limited use areas. There is no reason to revisit that decision now, especially since it was the only part of the decision that was legally defensible. Of course, the Commission had no authority to permit the installation of antennas on leased property, because the purpose of Section 207 was only to allow property owners, and not renters, to install antennas otherwise banned by zoning rules. Congress never intended to create new rights against property owners. The Commission's rules are particularly pernicious because they create incentives for tenants to damage property they do not own, and make it difficult for property owners to recover their costs or protect themselves against liability. The consequences of this decision are only now becoming apparent. Property owners are being forced to deal with thousands of antennas, many of them mounted in violation of the Commission's own order and applicable safety codes, but have been hamstrung by the threat of litigation and further case-by-case regulation by the Commission.[102] For the Commission to reverse itself on this point would create further havoc and violate the Fifth Amendment, as the Commission itself has acknowledged.

Similarly, the Commission has no authority to expand the scope of Section 207 to include nonvideo services. While we disagree with the Commission's broad interpretation of the

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[102] *See, e.g.*, Responses of Stuart Management Corp. and National Multi Housing Council, *et al.*, to Petition of John Sabrowski, CSR-5421-0 (filed August 30, 1999).

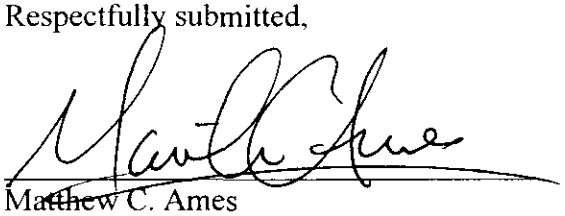
implication of the term "viewers," it is undeniable that Congress was concerned only with the delivery of video programming. In any case, the Commission has no authority to expand the rules, at least with respect to leased property. As WCA acknowledges, Section 207 was a directive to exercise existing authority, and was not a grant of new authority. WCA Comments at 13. As such, it cannot apply to property owners, because the Commission has no jurisdiction over them in the first place.

Accordingly, the Commission should do no further harm and must reject both proposals.

CONCLUSION

The Commission must reject all the forced access proposals in the NPRM and all of the allegations made by the CLECS. The record demonstrates that the Commission has no basis for regulating access to buildings. Any decision to proceed would be arbitrary, capricious, and an abuse of the Commission's discretion, even if the Commission had the necessary statutory authority.

Respectfully submitted,



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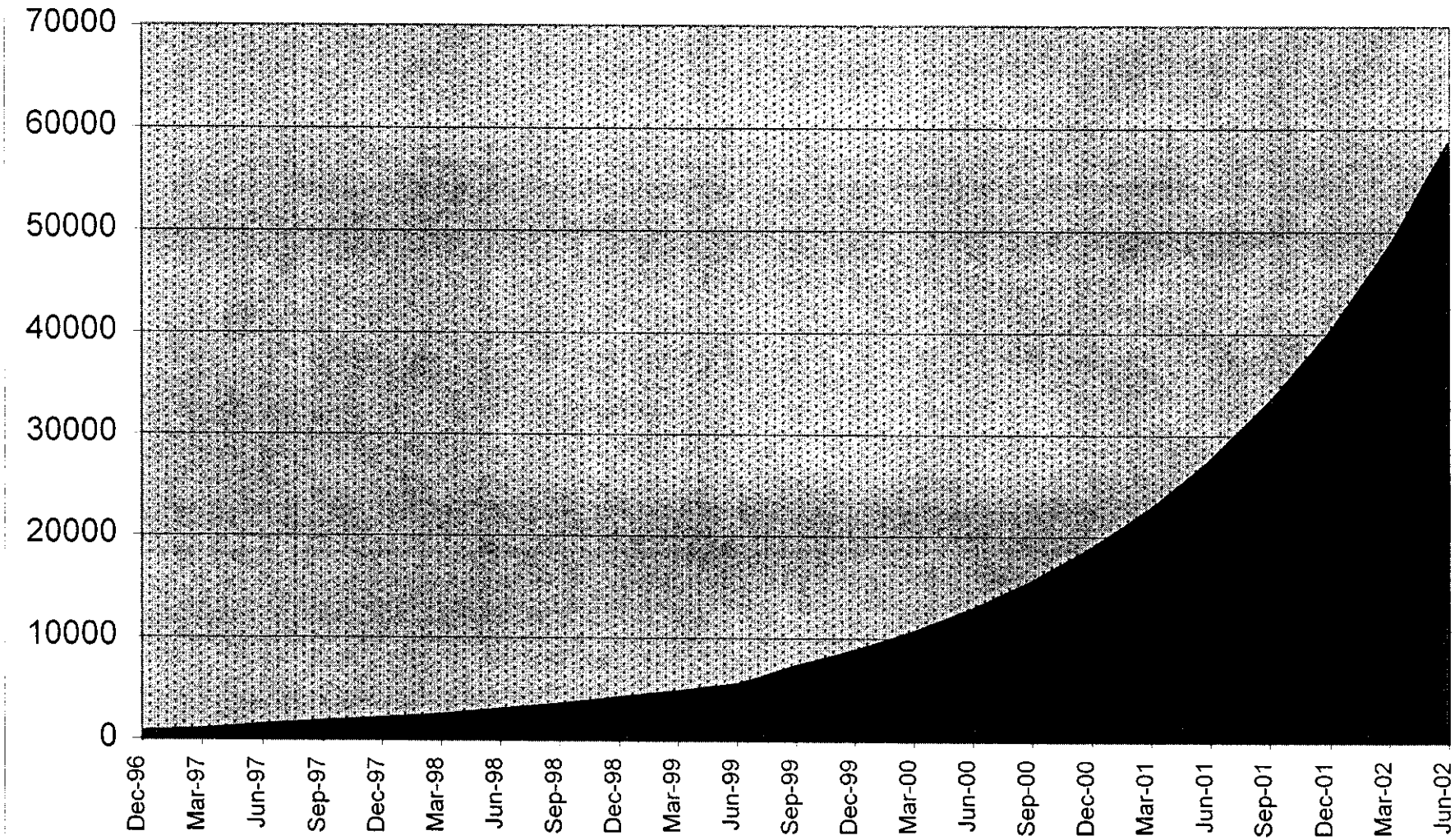
ATTACHMENT

WinStar Penetration Projection

Building Penetration Forecast

Winstar



Building Penetration Chart Methodology

The chart depicts the projected building penetration for WinStar. The chart was created using figures on WinStar's building penetration levels from December 1996 to the present obtained from press releases and quarterly reports issued by the company. This information was then loaded into an Excel Spreadsheet, which calculated the current growth rate using the known figures and then calculated predicted growth over the next 3 years.